fracture. Unfortunately this evidence was not forthcoming. Although in my own mind I could make a very very close guess as to what actually did happen, there can be no doubt that I am not entitled to do so. If any authority be required for this proposition as a statement of law, it can be found in the unreported (so far as I know) decisions of the Court of Appeal in *Low Say Thoot* v. *Sivasamy*[1] and *Loo Soo Kwan* v. *Rajamah & 5 Ors.*[2]. If further authority be required for this proposition it can be found, in my opinion, in the words of Lord Loreburn L.C. in *Marshall* v. *Owners of S.S. Wild Rose*[3]:

"Now in the affairs of life, where much is often obscure, men have to draw inferences of fact from slender premises. A plaintiff or claimant must prove his case. The burden is upon him. But this does not mean that he must demonstrate his case. It only means that if there is no evidence in his favour upon which a reasonable man can act he will fail. If the evidence, though slender, is yet sufficient to make a reasonable man conclude that in fact this man fell into the water by accident, and so was drowned, then the case is proved".

Admittedly this was a claim against an employer for workman's compensation, nevertheless the *dictum* which I have quoted has, in my opinion, general application. Again the same Judge in *Owners of Ship Swansea* v. *Jessie Mary Rice and Millicent Rice*[4] said:—

"What you want is to weigh probabilities, if there be proof of facts sufficient to enable you to have some foothold or ground for comparing and balancing probabilities at their respective value, the one against the other".

And Lord Shaw of Dunfermline, in the same case at p. 241, drew attention to the distinction between an inference in the ordinary sense and mere conjecture. In the judgment of their Lordships in the latter case they held that there was evidence which raised an inference, to them irresistible, that there must have been an accident. This again was a case for workman's compensation.

The onus of proving negligence on the part of the defendant was on the plaintiff, and the plaintiff failed to discharge the onus either by her own evidence or by cross-examination of the defendant or by admissions made by the defendant. I am therefore forced with regret to dismiss her claim. I have said "with regret" because I feel that had the plaintiff given the correct version, whilst she may have been found guilty of contributory negligence, she might have succeeded to some extent.

I have said on many occasions while sitting in Johore that litigants by using the procedure of admissions and interrogatories could well strengthen their case and save the time of the Court. The use of this and other interlocutory procedures is completely absent in Johore, and I have found that these procedures are much more frequently used in the States on the East Coast of Malaya.

There is one other matter to which I think it is my duty to refer and that is that, although the plaintiff complained of permanent injuries, there is no evidence of any medical examination after her discharge as an out-patient until she had completed her evidence, that is to say, until she was examined at 4 p.m. on the afternoon of the day on which she gave her evidence. Again at the commencement of the trial I was informed by counsel for the plaintiff that the Plan and Key were admitted. On confirmation of this I admitted them and they were accordingly marked as exhibits. Yet at the luncheon adjournment on the second day counsel for the defendant had the measurements on the Plan checked and there were found to be considerable discrepancies in the figures. In view of my decision the question does not arise as to whether or not, in the light of the admission of the Plan and the correctness of the Key by the defence counsel, these discrepancies could be taken into account.

My object in drawing attention to this is that I have noticed during the time I have been in Johore a number of matters which, I am afraid, point to inadequate preparation on the part of counsel. I have said nothing in the past in the hope that the matter would be remedied. I mention it now in the hope that, in the interests of litigants, the necessity for such remarks will not arise in the future.

There will be judgment for the defendant with costs. During the course of the hearing, namely when I granted leave to amend the Statement of Claim, I deferred the question of costs. The effect of my decision is that it becomes no longer necessary for me to make any order in respect of the costs occasioned by the amendment.

Judgment for the defendant.

Solicitors: *Boswell, Hsieh & Lim; Battenberg & Talma.*

ONG YOK CHU & ANOR. v. YONG TECK FONG & ANOR.

[O. C. J. (Ismail Khan J.) June 29, 1960]

[Malacca — Originating Summons No. 24 of 1960]

Practice and Procedure — Originating Summons — Question of fact — Declaration of rights — R.S.C., 1957, O.54A r.1 and O.55 r.3(1) — Correct procedure.

In this case the plaintiffs alleged that the defendants had sold them a whole piece of land but owing to a mistake only a half undivided share in the said land was conveyed to them under the deed of conveyance. They applied by originating summons for a declaration that (a) they were the beneficial owners of the said piece of land, and (b) an order for the transfer by the defendants of a half undivided share in the said land to the plaintiffs.

It was urged for the plaintiffs that as the defendants had sold the whole of the land but had conveyed only a half share thereof to them the defendants were the trustees of the remaining undivided share for them, and that the procedure set out in O. 55 r. 3(1) was available to them.

Held: (1) it is contrary to all decided authorities to try disputed issues of fact on an originating summons;

(2) the plaintiffs should they so desire to obtain the relief they seek ought to proceed by writ.

Cases referred to:—

(1) *Foong Seong* v. *Chan San Choon* [1947] M.L.J. 85.
(2) *In re Powers* (1885) 30 Ch. D. 291, 296.
(3) *Dowse* v. *Gordon* [1891] A.C. 202.
(4) *In re Amalgamated Society of Rly. Servants (Parliamentary Fund Trusts). Addison* v. *Pilcher* [1910] 2 Ch. 547, 552.

ORIGINATING MOTION.

W. H. Sault for the plaintiffs.

Kaher Karam Singh for the defendants.

Ismail Khan J.: This is an application by the plaintiffs by an originating summons for a declaration that (1) they are the beneficial owners of all that piece of land situate at Ayer Panas in Malacca marked Lot No. 21 containing an area of 9 acres 3 roods 18 poles comprised in and held under statutory land grant No. 33015 dated 5th April, 1938; (2) an order for the transfer by the defendants of a half undivided share in the said land to the plaintiffs.

It is alleged by the plaintiffs that the defendants had sold them the whole of the said land but owing to a mistake only a half undivided share in the land was conveyed to them under the deed of conveyance. The defendants by their affidavit said that they sold only a half undivided share in the land as stated in the deed of conveyance and not the whole of the land.

Mr. Sault for the plaintiffs argued that as the defendants had sold the whole of the land but had conveyed only a half share thereof to the plaintiffs the defendants were the trustees of the remaining undivided share for the plaintiffs, and that he could avail himself of the procedure set out in Order 55 rule 3(1).

Mr. Karam Singh for the defendants objected that an originating summons is not the appropriate procedure for a case of this nature but did not cite any relevant authority. In this case the plaintiffs seek to establish a trust by the defendants in their favour as to the remaining half share in the land not conveyed by the deed of conveyance. This would depend on the question whether the defendants had agreed to sell the whole of the land as alleged by the plaintiffs or only a half share thereof to the plaintiffs as alleged by the defendants. This is purely a question of fact and, in my opinion, it would be contrary to all decided authorities to try disputed issues of fact on an originating summons — see *Foong Seong* v. *Chan San Choon*(1); *In Re Powers*(2); *Dowse* v. *Gordon*(3).

Mr. Sault says that the matter could also be dealt with under Order 54A rule 1. Order 54A rule 1 reads as follows:—

"Any person claiming to be interested under a deed, will, or other written instrument, may apply by originating summons for the determination of any question of construction arising under the instrument, and for a declaration of the rights of the persons interested."

I do not think that Order 54A rule 1 helps the plaintiffs because there is no question here of the construction of any deed. The deed of conveyance is clear. It says, according to the plaintiffs' affidavit, that only a half undivided share in the land was conveyed to the plaintiffs by the defendants. There can therefore be no question of any construction of the deed. The plaintiffs claim a declaration that they are the beneficial owners of the whole piece of land and a transfer by the defendants of the remaining half share in the land to them, but as Swinfen Eady J. said in *In Re Amalgamated Society of Railway Servants (Parliamentary Fund Trusts). Addison* v. *Pilcher*(4) at page 552 "but the declaration of the rights of the persons interested authorised by Order 54A rule 1 is intended to follow on the determination of the question of construction, and there is no question of construction here."

I should therefore stay the proceedings on this originating summons. The plaintiffs should they so desire to obtain the relief they seek ought to proceed by writ. The question of costs in these proceedings will be dealt with in the action.

Order accordingly.

Solicitors: *W. H. Sault; Kaher Singh & Karam.*

YAP KIM CHAN v. YAP SOW & ORS.

[A. C. J. (Ong J.) July 5, 1960]

[K. L. — Civil Appeal No. 5 of 1960]

Master and Servant — Wrongful dismissal — Complaint — Procedure in Commissioner's inquiry — Joinder of several complaints in one — Employment Ordinance, 1955, ss.70(a) and (b) and 72.

Section 72 of the Employment Ordinance, 1955, does not enable the Commissioner for Labour to confer on himself jurisdiction over persons who are not properly parties to proceedings before him. The object of the section is only to effect economy of effort and in paper in the Labour Department, if any labour Officer intends to exercise his discretion and permit the proceedings to be instituted by one complaint, he must at least record in his case book the names and addresses of the various complainants, that there appears to be a common cause of complaint, that one of them has the consent of the others to attend and act on behalf of and generally to represent the others, and that consequently he would permit this to be done under the provisions of section 72.

CIVIL APPEAL.

S. M. Yong for the appellant.

Respondents in person.

Ong J.: This is an appeal involving the construction of section 72 of the Employment Ordinance, 1955, which, I hope, may be of assistance to Labour Officers. The appeal is by an employer, who is a tapping contractor, against the decision of the Junior Assistant Commissioner for Labour, Selangor, given on December 31, 1959, whereby the appellant was ordered to pay to one Yap Sow (f) and 16 other rubber tappers formerly employed by him a total sum of $1,448.49, being wages due in varying amounts to each of them from October 1 to 10, 1959, together with one month's wages, in lieu of notice, for 13 of the 17 complainants, by reason of their wrongful dismissal.